IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

FRANCOIS HOLLOWAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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59 pp

QUESTION PRESENTED

Whether a jury may find that a defendant acted "with the intent to cause death or serious bodily harm" for purposes of the federal carjacking statute, 18 U.S.C. 2119, if it finds that the defendant intended to cause death or serious harm if the victim refused to comply with his demands.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 126 F.3d 82. The opinion of the district court (Pet. App. 25a-32a) is reported at 921 F. Supp. 155.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1997. The petition for a writ of certiorari was filed on December 12, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of

conspiracy to operate a "chop shop" in violation of 18 U.S.C. 371; operating a chop shop, in violation of 18 U.S.C. 2322; three counts of carjacking, in violation of 18 U.S.C. 2119; and three counts of using a firearm during and in relation to a crime of violence, in violation of 118 U.S.C. 924(c). He was sentenced to concurrent prison terms of 60 months for conspiracy, 151 months for operation of the chop shop, and 151 months for each count of carjacking; a consecutive term of five years' imprisonment on the first firearms count; and two additional consecutive 20-year terms on the two remaining firearms counts. The district court also imposed a five-year term of supervised release. The court of appeals affirmed. Pet. App. 1a-23a.

1. In September 1994, Teddy Arnold recruited his son, Vernon Lennon, to steal cars to be taken to a Queens, New York "chop shop" for dismantling. Lennon, in turn, recruited petitioner and David Valentine to assist him. The three agreed that they should use a firearm during their thefts, and Lennon showed the others a .32-caliber revolver for that purpose. Pet. App. 3a.

On October 14, 1994, petitioner and Lennon followed a 1992 Nissan Maxima driven by 69-year-old Stanley Metzger. When Metzger stopped and parked across from his residence, Lennon approached, pointed his gun at Metzger, and demanded Metzger's car keys. Metzger first gave Lennon his house keys, but Lennon demanded the car keys, telling Metzger "I have a gun. I am going to shoot." Metzger then surrendered his keys and his money, and Lennon drove away in the Maxima. Pet. App. 3a-4a.

The following day, Lennon and petitioner followed a 1991 Toyota Celica driven by Donna DiFranco. When DiFranco parked, Lennon approached her, pointed his gun at her, and demanded her money and car keys. After DiFranco disengaged the car alarm and unlocked the "club" device that secured the steering wheel, Lennon drove off in her car. Pet. App. 4a.

That same day, Lennon and petitioner followed a 1988 Mercedes-Benz driven by Ruben Rodriguez until Rodriguez parked near his home. As Lennon and petitioner approached him, Rodriguez retreated to his car. Lennon produced his gun and threatened: "Get out of the car or I'll shoot." Rodriguez complied, and Lennon demanded his money and car keys. When Rodriguez hesitated, petitioner punched him in the face. Rodriguez surrendered the items and fled on foot. Lennon drove off in the Mercedes, and petitioner followed in another car. Pet. App. 4a.

Lennon pleaded guilty to several carjacking and robbery charges and testified as a government witness at trial. Lennon testified that his plan was to steal cars without harming the victims, but that he would have used the gun if any of the victims had resisted or given him "a hard time." Pet. App. 5a.

Petitioner was charged with a variety of offenses. See pages 1-2, supra. With respect to carjacking, the district court instructed the jury that in order to find petitioner guilty it must find that his "intent in committing the crime [was] to cause death or serious bodily harm." Tr. 336. Over the objection of defense counsel, the court also instructed the jury that, under a theory of

"conditional" intent, it could find petitioner guilty if it found that he "intended to cause death or serious bodily harm if the alleged victims had refused to turn over their cars." Pet. App. 6a, 11a; Tr. 336-337.[1] The jury convicted petitioner on all counts.

2. The court of appeals affirmed. Pet. App. 1a-18a. With respect to the district court's "conditional intent" instruction,

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[1] The court gave the following instructions (Tr. 336-337):

> The defendant's intent in committing the crime must have been to cause death or serious bodily harm. I remind you that intentional conduct is done willfully, with a bad purpose to do something the law forbids, in this case, to cause death or serious bodily harm to the person from whom the car was taken.
>
> It is the defendant's theory of the case that the evidence fails to prove that he acted with intent to cause death or serious bodily harm.
>
> Evidence that the defendant intended to use a gun to frighten the victims is not sufficient in and of itself to prove an intent to kill or cause serious bodily harm. It is, however, one of the facts you may consider in determining whether the government has met its burden.
>
> You may also consider the fact that no victim was actually killed or seriously injured when you consider the evidence or lack of evidence as to the defendant's intent.
>
> In some cases, intent is conditional. That is, a defendant may intend to engage in certain conduct only if a certain event occurs.
>
> In this case, the government contends that the defendant intended to cause death or serious body harm if the alleged victims had refused to turn over their cars. If you find beyond a reasonable doubt that the defendant had such an intent, the government has satisfied this element of the offense.
>
> If you find that the co-defendant, Vernon Lennon, acted with the intent to cause death or serious bodily injury, that is not sufficient. You must find that the defendant shared in that intent before you can conclude that this element has been satisfied.

the court first reviewed the history of 18 U.S.C. 2119. Id. at 8a-11a. It noted that before 1994, Section 2119 required proof that a defendant possessed a firearm in connection with a carjacking, but imposed no explicit intent requirement. In 1994, Congress amended the statute to authorize imposition of the death penalty if a carjacking resulted in death, and to delete the phrase "possessing a firearm." The court remarked that the present language requiring "intent to cause death or serious bodily harm" was inserted late in the legislative process, without recorded explanation. Id. at 9a. The court nonetheless thought it "clear from • • • the legislative history that Congress intended to broaden the coverage of the federal carjacking statute," and it speculated that application of the new intent requirement to cases not involving the death of a victim "was, in all likelihood, an unintended drafting error." Pet. App. 9a-10a. The court "decline[d]," however, "any invitation to redraft the statute," and instead considered whether the new intent element could be satisfied by proof of "conditional" intent to kill or harm a victim only if it proved necessary to do so in order to effectuate the carjacking. Id. at 10a.

The court rejected (Pet. App. 12a) petitioner's argument that "conditional" intent involved "no more than a state of mind where death is a foreseeable event." In the court's view, "conditional intent requires a much more culpable mental state," because "[a] carjacker who plans to kill or use deadly force on a victim in the event that his victim fails to comply with his demands has engaged

in willful and deliberate consideration of his actions." Ibid. Under those circumstances, the court explained, "death is more than merely foreseeable, it is fully contemplated and planned for." Ibid.

The court observed that "the inclusion of a conditional intent to harm within the definition of specific intent to harm is a well-established principle of criminal common law" (Pet. App. 13a), supported by state statutory and case law, academic commentary, and the Model Penal Code (see id. at 13a-15a). "Furthermore, and most importantly," the court concluded that "incorporating conditional intent within the specific intent language of the carjacking statute comports with a reasonable interpretation of the legislative purpose of the statute." Id. at 15a. Rejecting an interpretation that "would have the federal carjacking statute covering only those carjackings in which the carjacker's sole and unconditional purpose at the time he committed the carjacking was to kill or maim the victim," the court held instead that "an intent to kill or cause serious bodily harm conditioned on whether the victim relinquishes his or her car is sufficient to fulfill the intent requirement set forth in the federal carjacking statute." Id. at 15a-16a.[2]

Judge Miner dissented. Pet. App. 18a-23a. In his view, there was "no basis in the plain language of [Section 2119] or in the

[2] The court also rejected petitioner's further claims that he had received ineffective assistance of counsel and that the trial court had erred in imposing consecutive sentences with respect to his firearms offenses. Pet. App. 16a-17a. Petitioner does not renew those claims in this Court.

legislative history for an element of conditional intent." Id. at 18a. Rather, Judge Miner concluded that "[t]he intent required is spelled out explicitly in the statute," and that any common-law interpretation of that requirement lay beyond the power of courts applying federal criminal law. Id. at 23a. He would therefore have reversed petitioner's convictions and remanded for retrial. Ibid.

ARGUMENT

Petitioner contends (Pet. 9-16) that in order to prove carjacking in violation of 18 U.S.C. 2119 the government must show that the defendant acted with the "purposeful objective" (Pet. 10) of causing death or serious bodily harm while taking the victim's car, whether or not the victim offered any resistance. This Court has recently denied review in two cases involving the same issue, and there is no reason for a different result here. See Anderson v. United States, 118 S. Ct. 123 (1997); Fraction v. United States, 118 S. Ct. 100 (1997); see also Romero v. United States, petition for cert. pending, No. 97-6863 (filed Nov. 18, 1997).

1. Section 2119 provides for the punishment of any person who "with the intent to cause death or serious bodily harm takes a motor vehicle * * * from the person or presence of another by force and violence or by intimidation." As the court of appeals pointed out (Pet. App. 7a-9a), Congress added the "intent" language in 1994 in place of the phrase "possessing a firearm as defined in Section 921 of this title." See also United States v. Anderson, 108 F.3d 478, 481-482, cert. denied, 118 S. Ct. 123 (1997). That change,

which accompanied the addition of authorization to impose the death penalty in cases in which death results, was evidently intended to broaden the statute to cover situations where the carjacker uses a knife or other weapon rather than a firearm. See id. at 481-483; Pet. App. 9a-10a. It would be ironic if the amendment were instead interpreted to narrow the coverage of Section 2119 by excluding cases in which a carjacker would prefer to proceed by intimidation, but intends to use actual force and violence if necessary -- cases that obviously fall within the core purpose of the statute.

The text does not require that result. The "intent" language added in 1994 need not be read to require any more than that the defendant intentionally undertook actions which posed a serious and unjustifiable risk of death or serious bodily harm to the victim. The conduct involved in most carjackings would, of course, easily satisfy that requirement. It would be the rare crime that met Section 2119's other criteria, but escaped punishment under that provision because of the extraordinary care taken by the defendant to ensure that his victims would sustain no physical harm.

This case, however, did not require the court of appeals to go that far in interpreting Section 2119's "intent" requirement. See Pet. App. 12a (distinguishing "conditional intent" from criminal recklessness or "depraved indifference"). Nothing in the facts of this case suggests a situation in which the defendant intended not to use force under any circumstances, but nonetheless took actions that presented a serious risk that injury or death would result. The court here held only that Section 2119 covers the conduct of a

defendant if the jury finds that he was prepared to use deadly force, but was spared the necessity of doing so by the victim's acquiescence in his demands. Pet. App. 15a-16a; see also United States v. Williams, 1998 WL 50,191 (8th Cir. Feb. 10, 1998); United States v. Romero, 122 F.3d 1334, 1339 (10th Cir. 1997), petition for cert. pending, No. 97-6863 (filed Nov. 18, 1997); Anderson, 108 F.3d at 485.

As the court of appeals explained (Pet. App. 13a-15a), that interpretation of the meaning of "intent" as used in Section 2119 is not only well supported by the common-law understanding of "specific" intent, but also "comports with a reasonable interpretation of the legislative purpose of the statute" (id. at 15a).[3] As the court observed (ibid.), it is implausible that Congress intended the federal carjacking prohibition to cover "only those

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[3] There is no force to petitioner's argument (Pet. 15-16) that the court below violated due process by "expand[ing] the principles of criminal liability which exist in the federal courts" or attempting to create a "federal common law of crimes." The court merely interpreted the word "intent" as Congress used it in a federal criminal statute. The proper interpretation is, of course, informed by the common-law background against which Congress acted (see, e.g., United States v. Wells, 117 S. Ct. 921, 927 (1997)), but the exercise remains one of statutory construction. Moreover, there is nothing "novel"(Pet. 15) about the concept of "conditional" intent. See, e.g., United States v. Arrellano, 812 F.2d 1209, 1211 n.2, as amended, 835 F.2d 235 (9th Cir. 1987) ("[C]onditional intent is still intent. If, for example, a defendant breaks into a woman's house intending to rape her if she is there, he has committed a burglary whether or not she is in fact there"); United States v. Marks, 29 M.J. 1, 3 (C.M.A. 1989); United States v. Dworken, 855 F.2d 12, 18 (1st Cir. 1988) (attempt and conspiracy); Shaffer v. United States, 308 F.2d 654 (5th Cir. 1962) (conditional intent to do bodily harm in prosecution for assault under 18 U.S.C. 113), cert. denied, 373 U.S. 939 (1963); People v. Connors, 253 Ill. 266, 272-280 (Ill. 1912); see also W. Lafave and A. Scott, Substantive Criminal Law § 3.5(d), at 312 (1986); Model Penal Code § 2.02(6).

carjackings in which the carjacker's sole and unconditional purpose * * * was to kill or maim the victim." See also Williams, 1998 WL 50,191, at *3-*4; Romero, 122 F.3d at 1339 ("Congress did not intend for death or serious bodily injury to be a prerequisite to every carjacking conviction."); Anderson, 108 F.3d at 483. That is especially evident in light of the enhanced penalties that Congress expressly provided for crimes that do result in serious injury or death. Ibid.; see 18 U.S.C. 2119 (2) and (3).

Similarly, a rule requiring "unconditional" intent to kill or harm would make little sense in light of Section 2119's prohibition against taking a vehicle "by force and violence or by intimidation" (emphasis added). That language makes clear that Congress intended to punish crimes in which successful threats obviate any need for the carjacker to resort to actual force; yet those crimes would lie beyond the reach of the statute under petitioner's proposed requirement of "unconditional" intent to cause death or bodily harm. Indeed, because it would be difficult to prove such an "unconditional" intent in any case in which the carjacker did not in fact do violence to the victim, petitioner's argument would essentially read the phrase "or by intimidation" out of Section 2119.

2. As petitioner points out (Pet. 10-11), there is considerable tension between the reasoning of the decisions in this case, Williams, Anderson and Romero and that of United States v. Randolph, 93 F.3d 656 (9th Cir. 1996). See also Pet. App. 16a n.4. In Randolph, the Ninth Circuit stated that a "mere conditional intent to harm a victim if she resists is simply not enough to

satisfy § 2119's new specific intent requirement," and that the government must "prove that the causation of 'death or serious bodily harm' was the defendant's actual intent." 93 F.3d at 665. Both Randolph's reasoning and its result are incorrect.

Randolph turned, however, not only on erroneous reasoning, but on unusual facts. As the court explained (see 93 F.3d at 658-659), although Randolph pointed a gun at his victim, she was assured from the outset that she would not be harmed if she did as she was told. Randolph dropped the victim off, unharmed, some way out of town, and he denied any complicity in his accomplices' decision to pick her up again, drive her further away, and then beat her severely before releasing her. Randolph "consistently denied having any intention to kill or to harm [the victim], and insisted that the group's plan was merely to rob, not to harm anyone." Id. at 659. Indeed, he specifically claimed that, while he brandished a rifle in order to intimidate the victim, "he had no intention of actually using the firearm, even had she resisted." Ibid.

Randolph's conviction should have been affirmed, either because his conduct posed a sufficient (and sufficiently obvious) risk of injury or death to satisfy the intent element of Section 2119, whatever his own hopes for how the crime would proceed, or because the district court that convicted him was entitled to believe, despite his protestations to the contrary, that he was personally prepared to harm or kill his victim had she resisted his demands. Nonetheless, the facts of the case are so unusual that a court might have concluded that Randolph's conduct, in contrast to

that of his accomplices, clearly demonstrated an actual intent to avoid harm to his victim – the rare sort of case that might justify acquittal even under a standard requiring only criminal recklessness, and certainly would require acquittal under the "conditional intent" standard applied in this case, Williams, Romero and Anderson.

It is therefore difficult to predict, based solely on the decision in Randolph, how the Ninth Circuit will approach other carjacking cases with more typical facts, like those at issue here. Compare United States v. Hicks, 103 F.3d 837, 842-844 (9th Cir. 1996) (upholding admission under pre-amendment language of evidence concerning rape and murder during course of carjacking, and stating that new "intent" language would not change the result), cert. denied, 117 S. Ct. 1483 (1997); United States v. Arrellano, 812 F.2d 1209, 1211 n.2, as amended, 835 F.2d 235 (9th Cir. 1987) (although conditional intent to kill victim if she refused request for money might support conviction for transporting firearm with intent to commit a felony, "the jury made no finding as to intent, so we are unable to imply any finding as to conditional intent either"). If that court adheres to Randolph and extends its reasoning to the logical extreme, it may be necessary for this Court to grant review in an appropriate case to correct the error. Review would be premature, however, until the Ninth Circuit has had a chance to consider the relevant issues in a case with more typical facts, and in light of the intervening decisions in this case, Williams, Anderson and Romero.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
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DEBORAH WATSON
Attorney

MARCH 1998

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1877—August Term, 1996

(Argued June 25, 1997 Decided September 16, 1997)

Docket No. 96-1563

UNITED STATES OF AMERICA,

Appellee,

—v.—

TEDDY ARNOLD; CHARLES ROBINSON; DARREL JONES; DAVID VALENTINE; PAUL SCAGLIONE; and JEFFREY DRAKE,

Defendants,

FRANCOIS HOLLOWAY a/k/a ABDU ALI,

Defendant-Appellant.

Before:

MCLAUGHLIN and MINER, *Circuit Judges*, and SCULLIN, *District Judge*.[1]

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[1] The Honorable Frederick J. Scullin, Jr. of the United States District Court for the Northern District of New York, sitting by designation.

Appeal from a judgment entered in the United States District Court for the Eastern District of New York (Gleeson, J.) convicting defendant, following a jury trial, of conspiracy to operate a "chop shop," operation of a chop shop, three counts of carjacking, and three counts of using a firearm in the commission of a crime of violence.

Affirmed.

Judge Miner dissents in a separate opinion.

KEVIN J. KEATING, Esq., Law Office of Kevin J. Keating, Garden City, New York, *for Defendant-Appellant*.

DOLAN L. GARRETT, Assistant United States Attorney, Brooklyn, New York (Zachary W. Carter, United States Attorney, Eastern District of New York, Brooklyn, New York, of counsel), *for Appellee*.

SCULLIN, *District Judge*:

Defendant-Appellant Francois Holloway appeals from a judgment entered in the United States District Court for the Eastern District of New York (Gleeson, J.), following a jury trial, convicting Holloway of numerous offenses connected with his participation in several carjackings in Queens, New York. Holloway was convicted of one count of conspiracy to operate a "chop shop" in violation of 18 U.S.C. § 371 (count one); one count of operating a chop shop in violation of 18

U.S.C. § 2322 (count two); three counts of carjacking in violation of 18 U.S.C. § 2119 (counts seven, nine, and eleven); and three counts of using a firearm in the commission of a crime of violence in violation of 18 U.S.C. § 924(c) (counts eight, ten, and twelve). Holloway was sentenced to 60 months on count one; 151 months on count two, to run concurrently with count one; 151 months on each of counts seven, nine, and eleven, to run concurrently with each other and counts one and two; 5 years on count eight, to run consecutively; and 20 years each on count ten and count twelve, each to run consecutively. Defendant was also sentenced to terms of supervised release and a special assessment of $400.

On appeal, Holloway contends that: (1) the district court erroneously charged the jury on the intent element of the carjacking statute; (2) his trial counsel rendered constitutionally ineffective assistance; and (3) the trial court improperly imposed consecutive sentences pursuant to Holloway's firearm convictions.

BACKGROUND

Holloway's conviction stems from his involvement in a "chop shop" operation located at 115th Drive in Queens, New York. In September 1994, Teddy Arnold recruited his son, Vernon Lennon, to begin stealing cars to be taken to the chop shop for dismantling. Lennon, in turn, recruited two individuals, David Valentine and Holloway, to assist him in his car thefts. The co-conspirators agreed that they should use a firearm during their thefts, and Lennon showed both Valentine and Holloway a .32 caliber revolver he intended to use for that purpose.

The first charged carjacking involving Holloway and Lennon occurred in October 1994. On October 14, Holloway and Lennon followed a 1992 Nissan Maxima driven by sixty-

nine year-old Stanley Metzger. When Metzger stopped and parked across from his residence, Lennon approached Metzger and pointed his revolver at him, demanding his car keys. At first, Metzger gave his house keys to Lennon, who rejected them and demanded his car keys. Metzger testified that Lennon told him, "I have a gun. I am going to shoot." Thereafter, Metzger surrendered his keys and also his money, and Lennon drove away in the Maxima.

The following day, Lennon and Holloway followed a 1991 Toyota Celica driven by Donna DiFranco. When DiFranco parked, Lennon approached her, leveled his gun at her, and demanded her money and her car keys. After DiFranco disengaged the car alarm and unlocked her "club" securing the steering wheel, Lennon drove off in her car.

That same day, Holloway and Lennon followed a 1988 Mercedes-Benz driven by Ruben Rodriguez until he parked near his home at Jamaica Estates. Both Lennon and Holloway approached the driver this time. Rodriguez, sensing something was wrong, retreated to his car. Lennon produced his gun and threatened, "Get out of the car or I'll shoot." Rodriguez complied and Lennon demanded his money and car keys. When Rodriguez hesitated, Holloway punched him in the face. Rodriguez surrendered the items and fled on foot, yelling for help. Lennon drove off in the Mercedes, and Holloway followed in another car.

At trial, the Government also presented evidence of two additional uncharged carjackings involving Lennon and Holloway. One involved the theft of a 1987 Nissan Maxima which was stolen from Betty Eng as she parked in her driveway on October 12, 1994. The other uncharged carjacking occurred on October 19, 1994. On that day, Holloway and Lennon attempted to steal a 1994 Nissan Sentra from Sara Markett when she parked her car on 193rd Street in Queens.

Lennon threatened Markett, telling her, "Give me your keys or I will shoot you right now." Thereafter, Markett surrendered her keys and ran screaming into a nearby hair salon. The theft was foiled by an off-duty police officer, Adam Lamboy, who happened to be in the hair salon at that time. Upon seeing Lennon in Markett's car, Lamboy yelled, "Police, don't move." Lennon made a motion toward his waist band prompting Lamboy to draw his weapon. Lennon then fled to a red Toyota driven by Holloway, and the two escaped.

On November 22, 1994, two of the carjacking victims, Ruben Rodriguez and Sara Markett, identified Holloway as one of the carjackers in a police line-up. Following his identification, Holloway confessed to the police that he had participated with Lennon in three carjackings involving a silver Mercedes-Benz, a black Nissan Maxima, and a gray Nissan. Immediately prior to trial, Lennon pled guilty to several carjacking charges and eight automatic teller machine ("ATM") robberies. Thereafter, Lennon testified at trial as a government witness. Lennon testified as to the events set forth in the above carjackings, as well as seven additional carjackings in which he participated with Valentine. Lennon testified that his plan was to steal the victims' cars without harming the victims; however, Lennon also testified that he would have used the gun if one of the victims had given him "a hard time" or had resisted.

The Government also presented testimony at trial from Rodriguez, Metzger, DiFranco, Eng, and Lamboy. These witnesses presented factually consistent testimony depicting the various carjackings as set forth above. With the exception of Rodriguez, none of the victims was injured during the course of the carjackings, and Rodriguez did not require medical attention.

The defense declined to call any witnesses. Over the objection of defense counsel, Judge Gleeson charged the jury on the doctrine of conditional intent, as it applied to the intent element for the carjacking offenses. Judge Gleeson instructed the jury that an intent to cause death or serious bodily harm conditioned on whether the victims surrendered their cars was sufficient to satisfy the specific intent requirement of the statute. As stated, the jury found Holloway guilty on all eight counts charged in the indictment.

Following the verdict, Holloway moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, or in the alternative, for reconsideration of his unsuccessful Rule 29 motion. *See United States v. Holloway*, 921 F. Supp. 155, 156 (E.D.N.Y. 1996). Holloway argued that the Court erred in charging the jury on conditional intent in light of the carjacking statute's unambiguous specific intent requirement, which requires a carjacker to have the intent to cause death or serious bodily harm in order to be culpable.

In a decision issued on April 5, 1996, Judge Gleeson denied Holloway's post-trial motion. On August 16, 1996, Holloway was sentenced, and, on August 28, 1996, judgment of conviction was entered. This appeal followed.

DISCUSSION

Holloway raises three issues on appeal: (1) whether Judge Gleeson erred in instructing the jury on "conditional intent"; (2) whether the performance of Holloway's trial counsel was constitutionally deficient so as to require reversal and a new trial; and (3) whether Judge Gleeson abused his discretion by sentencing Holloway to consecutive sentences pursuant to 18 U.S.C. § 924(c).

I. *Conditional Intent Instruction*

Holloway maintains that Judge Gleeson committed reversible error by charging the jury on the doctrine of "conditional intent." Holloway contends that: (1) the federal carjacking statute clearly and unambiguously requires that a defendant possess a specific intent to cause death or serious bodily harm (hereinafter "specific intent to kill"), and (2) conditional intent, by definition, does not satisfy this requirement.

A. 1994 Amendments to the Carjacking Statute

Holloway argues that the statute, as amended, is clear and unambiguous on its face, thus preventing the trial court, or this Court for that matter, from inquiring into the intent of Congress or ascribing some alternate construction of the statute based on any perceived error in drafting. *See Rubin v. United States*, 449 U.S. 424, 430, 66 L. Ed. 2d 633, 101 S. Ct. 698 (1981).

Prior to the 1994 Amendments, the federal carjacking statute, 18 U.S.C. § 2119, read as follows:

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241

> or 2242 of this title) results, be fined under this title or imprisoned not more that 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

The Violent Crime Control and Law Enforcement Act of 1994 amended this statute in the following manner:

> (14) CARJACKING. —Section 2119(3) of title 18, United States Code, is amended by striking the period after "both" and inserting ", or sentenced to death."; and by striking ", possessing a firearm as defined in section 921 of this title," and inserting ", with the intent to cause death or serious bodily harm".

Pub. L. 103-322, § 60003(a)(14). With these revisions, the statute now reads:

> Whoever, *with the intent to cause death or serious bodily harm* takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more that 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, *or sentenced to death.*

18 U.S.C. § 2119 (1997) (emphasis added).

The amendments to the carjacking statute contained in the Violent Crime Control and Enforcement Law Act of 1994 came about as an attempt to expand the number of federal crimes subject to the death penalty. *See* 140 Cong. Rec. E857-03 (statement of Rep. Franks); 140 Cong. Rec. S12421-01, S12458 (statement of Sen. Nunn); 139 Cong. Rec. S15295-01, 15301 (statement of Sen. Lieberman). The thrust of the various early versions of the amendments was to add the death penalty as a sentencing option when death resulted from a carjacking, and also, in some versions, to eliminate the firearm requirement. *See* H.R. 4197, 103d Cong. § 125(h) (1994) (removed firearm requirement and added death penalty); H.R. 3355, 103d Cong. § 203(a)(15) (1993) (version as of October 19, 1993 removed the firearm requirement and added death penalty); H.R. 3355, 103d Cong. § 703(e) (1994) (version as of April 21, 1994 added the death penalty only). Congressional opposition to the amendments coalesced into two camps: those who opposed the death penalty in general, and those who opposed the expansion of federal criminal jurisdiction. *See* 140 Cong. Rec. S12309-02, S12311 (statement of Sen. Leahy contained in Conference Report on H.R. 3355); 140 Cong. Rec. H2322-02, H2325 (statement by Rep. Glickman on amendment introduced by Rep. Scott to remove the death penalty addition to the Violent Crime Control Act).

The insertion of the heightened intent requirement at issue here occurred at a relatively late stage in the legislative process—while the Act was under consideration in Conference Committee in the summer of 1994. *See* 140 Cong. Rec. H8772-03, H8819, H8872 (Conference Report on H.R. 3355 dated August 21, 1994). On September 13, 1994, the Act was signed into law. There is no indication in the Congressional Record as to the purpose of the late-added heightened intent requirement. However, it is clear from a review of legislative history that Congress intended to broaden the coverage of the

federal carjacking statute by the passage of the 1994 amendments, and that the application of the heightened intent requirement to all three of the carjacking categories was, in all likelihood, an unintended drafting error. *See* 139 Cong. Rec. S15295-01, 15301 (statement of Sen. Lieberman) ("This amendment will broaden and strengthen that law so our U.S. attorneys have every possible tool available to them to attack the problem."); 140 Cong. Rec. E857-03, E858 (extension of remarks by Rep. Franks) ("We must send a message to the criminal that committing a violent crime will carry a severe penalty. This legislation will make an additional 22 crimes including carjacking and drive-by shootings, subject to the death penalty.").

At least two courts have speculated that Congress probably intended the heightened intent requirement to apply only to cases where the carjacking resulted in death, that is, those cases falling under § 2119(3). *See United States v. Anderson*, 108 F.3d 478, 482-83 (3d Cir. 1997), *petition for cert. filed* (U.S., June 3, 1997) (No. 96-9338); *Holloway*, 921 F. Supp. at 158. *But see United States v. Randolph*, 93 F.3d 656, 660-61 (9th Cir. 1996). In support of this interpretation, these courts point to the initial wording of the 1994 amendment, *"Section 2119(3) of title 18, United States Code, is amended by . . . . ,"* as limiting language for the two specific changes set forth within. *See Anderson*, 108 F.3d 378-79 (quoting Pub. L. No. 103-322, § 60003(a)(14) (emphasis added); *see also Holloway*, 921 F. Supp. at 158.

Regardless of the actual intent of Congress in adding this amendment, the practical effect of adding this requirement is to severely limit the scope of conduct covered by the statute. The addition of the heightened intent requirement into the body of the carjacking statute limits federal jurisdiction over all carjacking offenses to only those in which death or serious bodily harm was intended. Notwithstanding that such a

result was unintended, the Court declines any invitation to redraft the statute—that is a task better left to the legislature.[2] Thus, the sole issue this Court must decide is whether the "specific intent to kill," as now reflected in 18 U.S.C. § 2119, encompasses a conditional intent, as defined by Judge Gleeson in his instruction to the jury.

B. Judge Gleeson's Instruction

In his instruction to the jury, Judge Gleeson charged, in relevant part:

> Evidence that the defendant intended to use a gun to frighten the victims is not sufficient in and of itself to prove an intent to kill or cause serious bodily harm. It is, however, one of the facts you may consider in determining whether the government has met its burden.
>
> You may also consider the fact that no victim was actually killed or seriously injured when you consider the evidence or lack of evidence as to the defendant's intent.
>
> In some cases, intent is conditional. That is, a defendant may intend to engage in certain conduct only if a certain event occurs.
>
> In this case, the government contends that the defendant intended to cause death or serious bodily harm if the alleged victims had refused to turn over their cars. If you find beyond a reasonable doubt that the defendant had such an intent, the government has satisfied this element of the offense.

[2] We note that since the 1994 amendments there have been several legislative initiatives introduced in Congress that seek to remove the intent portion of the carjacking statute. *See* The Violent Crime Control and Law Enforcement Act of 1995, S. 3, 104th Cong. § 717 (1995) (titled "Elimination of Unjustified Scienter Element for Carjacking"); Omnibus Crime Control Act of 1997, S. 3, 105th Cong. § 807 (1997) (titled "Elimination of Unjustified Scienter Element for Carjacking").

> If you find that the co-defendant, Vernon Lennon, acted with the intent to cause death or serious bodily injury, that is not sufficient. You must find that the defendant shared in that intent before you can conclude that this element has been satisfied.

Holloway argues that the above instruction was erroneous because it allowed the jury to convict him based on lesser mental state than is required by the carjacking statute. Holloway contends that the plain meaning of "specific intent to kill" does not include the lesser mental state of "conditional intent," because a conditional intent to kill is no more than a state of mind where death is a foreseeable event and, as such, is equivalent to a mental state of recklessness or depraved indifference. Holloway contends that such a lesser mental state plainly does not satisfy the intent requirement of the carjacking statute.[3]

The Court agrees that a conditional intent to cause death or serious bodily harm and "reckless indifference" both involve foreseeability; however, conditional intent requires a much more culpable mental state. A carjacker who plans to kill or use deadly force on a victim in the event that his victim fails to comply with his demands has engaged in willful and deliberate consideration of his actions. Under these circumstances, death is more than merely foreseeable, it is fully contemplated and planned for. Such a mental state is clearly distinguishable from the characterization of conditional intent advanced by Holloway, which only has the carjacker *aware* of a *risk* of death of which he chooses to disregard.

Holloway further argues that the Supreme Court case, *Tison v. Arizona*, 481 U.S. 137, 107 S. Ct. 1676 (1987), fore-

[3] Holloway cites to Second Circuit precedent which holds that proof of a reckless or wanton state of mind cannot constitute a specific intent to kill. *See, e.g., United States v. Kwong*, 14 F.3d 189, 194-95 (2d Cir. 1994).

closes the inclusion of conditional intent within the scope of an ordinary specific intent to kill. In *Tison*, co-defendants Raymond and Ricky Tison planned an armed jail break to free their father, Gary Tison, and another inmate from the Arizona State Prison. *Id.* at 139. After a successful escape from prison, a flat tire in their getaway car led to the stopping and theft of a family's car in the desert outside of Flagstaff, Arizona. *See id.* at 140. The defendants witnessed their father brutally execute the family who had been in the car. *See id.* at 141. The defendants were found guilty of aggravated felony-murder and sentenced to death. *See id.* at 142. In the context of reviewing a collateral attack on the imposition of the death penalty, the Supreme Court found that under the factual circumstances presented, the defendants lacked a "specific intent to kill," and at most had a culpable mental state of reckless indifference to human life. *Id.* at 152. Holloway seizes on this language, characterizing conditional intent as an analogous mental state to that ascribed to the defendants in *Tison*. Holloway argues that, at best, the proof shows that he and Lennon shared a conditional intent to kill, which only meant that it was foreseeable that death could result from their various carjackings.

The facts of *Tison* are plainly distinguishable from the case at bar. In *Tison* some violence was foreseeable to the defendants in effecting the jailbreak, however, the murders for which the defendants were convicted were precipitated by a completely unplanned event, the flat tire in the desert. Thus, while it may have been foreseeable to them that death would occur in the course of the escape, the murders that flowed from their breakdown in the desert were not the result of a willful and deliberate plan.

Furthermore, the inclusion of a conditional intent to harm within the definition of specific intent to harm is a well-established principle of criminal common law. In his decision

denying Holloway's Rule 33 motion, Judge Gleeson cited to state criminal law authority as support for his conditional intent charge. *See Holloway*, 921 F. Supp. at 159 (citing W.R. LaFave and A.W. Scott, Jr., *Handbook on Criminal Law* § 28 at 200 (1972); Model Penal Code § 2.02(6) (American Law Institute); *People v. Connors*, 253 Ill. 266, 97 N.E. 643 (1912); *Hairston v. Mississippi*, 54 Miss. 689 (1877)). Following his decision, the Third Circuit in *United States v. Anderson* cited to Judge Gleeson's opinion with approval, finding that "conditional intent" was included within the specific intent required by the carjacking statute. 108 F.3d at 483, 485. The *Anderson* court also cited to additional authority confirming this principle of criminal law, including the incorporation of the doctrine of conditional intent into some state penal codes. *See* Del. Code Ann. tit. 11 § 254 (1996) ("The fact that a defendant's intention was conditional is immaterial unless the condition negatives the harm or evil sought to be prevented by the statute defining the offense."); 18 Pa. Cons. Stat. Ann. 18 § 302(f) (West 1997) ("Requirement of intent satisfied if intent is conditional—When a particular intent is an element of an offense, the element is established although such intent is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense."); Haw. Rev. Stat. § 702-209 (1996) ("When a particular intent is necessary to establish an element of an offense, it is immaterial that such intent was conditional unless the condition negatives the harm or evil sought to be prevented by the law prohibiting the offense."); *see also Shaffer v. United States*, 308 F.2d 654, 654-55 (5th Cir. 1962); *People v. Vandelinder*, 481 N.W.2d 787, 788-89 (Mich. Ct. App. 1992); *Commonwealth v. Richards*, 293 N.E.2d 854, 860 (Mass. 1973). *But see State v. Irwin*, 285 S.E.2d 345, 349 (N.C. Ct. App. 1982).

This Court also finds ample persuasive authority supporting the inclusion of conditional intent within the scope of the specific intent requirement. *See People v. Thompson*, 209 P.2d 819, 820 (Cal. Ct. App. 1949); *People v. Henry*, 190 N.E. 361, 361-62 (Ill. 1934); *Johnson v. State*, 605 N.E.2d 762, 765 (Ind. Ct. App. 1992); *Gregory v. State*, 628 P.2d 384, 386 (Okla. Crim. App. 1981); *see also* 40 Am. Jur. 2d Homicide § 571 (1968) ("The question whether an assault accompanied by a threat to kill unless a demand is complied with is an assault with intent to kill or murder has generally been answered in the affirmative . . . ."). Furthermore, and most importantly, incorporating conditional intent within the specific intent language of the carjacking statute comports with a reasonable interpretation of the legislative purpose of the statute. The alternative interpretation would have the federal carjacking statute covering only those carjackings in which the carjacker's sole and unconditional purpose at the time he committed the carjacking was to kill or maim the victim. Such an interpretation would dramatically limit the reach of the carjacking statute. "It is well-established that 'in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and its object and policy.' " *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51, 107 S. Ct. 1549, 1554 (1987)). A statute should not be literally applied if it results in an interpretation clearly at odds with the intent of the drafters. *See id.* While the Court cannot and should not rewrite a poorly drafted statute, it has an obligation to interpret a statute so as to give it reasonable meaning.

After reviewing the substantial body of state law addressing this issue, and the clear legislative purpose of 18 U.S.C. § 2119, the Court finds that an intent to kill or cause serious bodily harm conditioned on whether the victim relinquishes his or her car is sufficient to fulfill the intent requirement set

forth in the federal carjacking statute.[4] *Accord Anderson*, 108 F.3d at 485. As such, we accept the well-reasoned opinion of the court below, and hold that Judge Gleeson did not err when he instructed the jury on conditional intent.

II. *Ineffective Assistance of Counsel*

Holloway's second ground for appeal is that he received constitutionally ineffective assistance of counsel, requiring the reversal of his conviction and a new trial. Holloway argues that even though his defense counsel relied on a legally sound argument premised on the lack of specific intent, once Judge Gleeson rejected his argument, Holloway's conviction was a foregone conclusion. Holloway argues that his trial counsel should have presented his specific intent defense, while at the same time vigorously contesting the evidence concerning all of the other elements in question.

Claims for ineffective assistance of counsel are analyzed under the framework set forth in *Strickland v. Washington*, 466 U.S. 668, 686 (1984), which requires that a defendant show "(1) that his attorney's performance fell below an 'objective standard of reasonableness,' and (2) that 'there is

[4] The Ninth Circuit seemingly came to the opposite conclusion in *United States v. Randolph*, 93 F.3d 656, 665 (9th Cir. 1996), when it stated, "[t]he mere conditional intent to harm a victim *if* she resists is simply not enough to satisfy § 2119's new specific intent requirement." However, in *Randolph* the only evidence of intent was a threat made by one of the defendants to the victim that " 'she would be okay' if she '[did] what was told of her.' " *Id.* The Ninth Circuit held that "more than a mere threat is required to establish a specific intent to kill or harm." *Id.* We agree with the Ninth Circuit that without more, a mere threat of harm is not sufficient to establish a specific intent to kill. In fact, Judge Gleeson so charged in his jury instruction.

We do, however, disagree with the Ninth Circuit's dicta that equated a threat of harm to conditional intent. *See id.* The court stated, "[the defendant's] threat was tantamount to a conditional intent to harm." *Id.* While a threat is certainly evidence of a conditional intent to harm, conditional intent is not equivalent to a threat, it is much more. Conditional intent implies some indication that the defendant means to make good on his threat to harm. An *idle* threat can never constitute an intent to kill.

a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Kieser v. New York*, 56 F.3d 16, 18 (2d Cir. 1995) (quoting *Strickland*, 466 U.S. at 688, 694).

Even if Holloway could establish the first prong of the *Strickland* test, he has not met his burden on the second prong. The trial counsel's "intent" defense was appropriately directed at the most questionable aspect of the Government's case. Trial counsel's strategy to concede the other elements of the offense was reasonable in light of the overwhelming evidence in the case, i.e., Lennon's testimony that Holloway assisted him in the carjackings, several victims' identification of Holloway, and Holloway's own confession. Holloway's assertion that the outcome of the trial would have somehow been different had his trial counsel more vigorously contested this testimony is conclusory and unpersuasive given the record before the Court. As such, Holloway's appeal in this respect lacks merit.

III. *Imposition of Consecutive Sentences*

Finally, Holloway contests the imposition of consecutive sentences on his firearm convictions pursuant to 18 U.S.C. § 924(c). Holloway concedes that this Court has already held in *United States v. Mohammed* that issuing consecutive sentences under the carjacking statute and the firearm statutes based on the same carjacking is constitutionally permissible. 27 F.3d 815, 820-21 (2d Cir. 1994). However, Holloway argues that because the trial court lowered the standard of proof for carjacking by allowing a verdict based on conditional intent, then the trial court should be precluded from imposing consecutive sentences based on those offenses. The Court finds this argument to be wholly without merit.

CONCLUSION

Based on the foregoing, we affirm the judgment of the district court.

MINER, *Circuit Judge*, dissenting:

Because I perceive no basis in the plain language of the statute or in the legislative history for an element of conditional intent in the crime under examination here, I respectfully dissent.

As originally cast, the carjacking legislation established as a federal crime the taking or attempted taking of a motor vehicle having some connection with interstate commerce from the person or presence of another by force, violence or intimidation on the part of one possessing a firearm. *See* 18 U.S.C. § 2119 (prior to 1994 Amendment). Enhanced penalties for the infliction of serious bodily injuries or resulting death were provided. *See id.* § 2119(2), (3). The statute after amendment defines the crime as the taking or attempted taking of a motor vehicle having some connection with interstate commerce from the person or presence of another by force or violence on the part of one who intends to cause death or serious bodily harm. *See id.* (as amended). The penalty if death results is further enhanced to include the death penalty. *See id.* § 2119(3). The distinctions to be made between the original and the amended statute are clear: the firearm possession requirement is deleted; a specific intent element is added; and the penalty provision is expanded.

Despite the foregoing, my colleagues approve the district court's failure to instruct the jury as the statute requires regarding the specific intent to cause death or serious bodily harm, and further approve the following substituted instruc-

tion, which allows for conviction on proof of conditional intent:

> In this case, the government contends that the defendant intended to cause death or serious bodily harm *if the alleged victims had refused to turn over their cars*. If you find beyond a reasonable doubt that the defendant had such an intent, the government has satisfied this element of the offense.

(Emphasis added.) What is the provenance of such an instruction? It surely is not the language of the statute itself. It is not even the indictment, for the indictment parrots the statute. The district court therefore was wrong in charging the jury that the government had advanced a conditional intent contention.

In arriving at their conclusion, my colleagues first turn to the legislative history and properly note that the amendment to the carjacking statute represented an effort to expand the number of crimes subject to the death penalty, including carjacking where death results. There is also an indication of an intent on the part of Congress to eliminate the firearm requirement. Ultimately, as all agree, the heightened intent requirement was added to the final amending legislation by the Congressional Conference Committee. There is no discernible information on why or how this element was added.

How, then, can it be said that "it is clear from a review of legislative history that Congress intended to broaden the coverage of the federal carjacking statute by the passage of the 1994 amendments, and that the application of the heightened intent requirement to all three of the carjacking [penalty] categories was, in all likelihood, an unintended drafting error[?]" Maj. Opn. at 8. No member of Congress has ever referred to "an unintended drafting error," and the congressional intent may well have been to narrow in some respects, as well as broaden in some respects, the statute's coverage.

The scienter requirement of the amended statute has been interpreted in different ways. While one circuit court thinks that Congress intended the specific intent provision to apply only where the carjacking resulted in death, *see United States v. Anderson*, 108 F.3d 478, 482 (3d Cir. 1997), another circuit court considers that the purpose of the amendment was to convert the entire general intent offense to a specific intent offense, *see United States v. Randolph*, 93 F.3d 656, 661 (9th Cir. 1996). But we have no authority to correct an "unintentional drafting error" where there is no reason to say that there is an "error" or that the statutory provision inserted is "unintended." By adding a conditional intent element to correct what the court perceives to be an error, we ignore the teaching of the Supreme Court that "[to] supply omissions transcends the judicial function." *Iselin v. United States*, 270 U.S. 245, 251 (1926), *quoted in West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991).

We do know that since the enactment of the 1994 amendment to the carjacking statute, Congress has made at least three attempts to eliminate what was termed the "unjustified scienter element for carjacking." Omnibus Crime Control Act of 1997, S. 3, 105th Cong. § 807; Violent Crime Control and Law Enforcement Improvement Act of 1995, S. 3, 104th Cong. § 717 ("VCCLEIA"); *see* Anti-Gang and Youth Violence Control Act of 1997, S. 362, 105th Cong. § 2113 ("AGYVCA"). These statutes would eliminate entirely the requirement that the government prove that the defendant possessed the intent to cause death or serious bodily harm. *See, e.g.*, VCCLEIA § 717 ("Section 2119 of title 18, United States Code, is amended by striking ', with the intent to cause death or serious bodily harm'."). It is unclear what happened to the earlier attempts to remove the intent element

from § 2119, but the AGYVCA, the most recent effort, presently appears to be before the Senate Judiciary Committee.

The only discussion we have concerning the attempts to remove the intent element comes from Senator Leahy's comments in introducing the AGYVCA. The Senator explained:

> Prior to the enactment of [the Violent Crime Control and Law Enforcement Act], the offense applied only if the defendant possessed a firearm. Section 60003(a)(14) of that law appropriately deleted the firearm requirement, as had been proposed in the Senate-passed bill, but in conference a new scienter element was added that the defendant must have intended to cause death or serious bodily injury. This unique new element will inappropriately make carjackings difficult or impossible to prosecute in certain situations. . . . The new requirement . . . will likely be a fertile [source] of argument for defendants in cases in which no immediate threat of injury occurs, such as where a defendant enters an occupied vehicle while it is stopped at a traffic light and physically removes the driver. Even when a weapon is displayed, the defendant may argue that although it was designed to instill fear, he had no intent to harm the victim had the victim in fact declined to leave the car.

143 Cong. Rec. S1659, S1661-62 (Feb. 26, 1997) (statement of Sen. Leahy).

Aside from the fact that Senator Leahy's comments represent the views of only one member of Congress, there is nothing in those comments to indicate that the "scienter element," as he calls it, was not intentionally placed in the statute when the 1994 Amendment was enacted. He is saying only that the element should be taken out. But, so far, his colleagues have not agreed that this should be done.

In this regard, it is of more than passing interest that carjacking is essentially a state offense, and it may well be the intent of Congress to limit the scope of the federal offense. *See generally* Geraldine Szott Moohr, *The Federal Interest in Criminal Law*, 47 Syracuse L. Rev. 1127 (1997). Several states have enacted specific carjacking statutes. *See, e.g.*, Fla. Stat. § 812.133 (1994); Md. Code Ann., Crimes and Punishments § 348A (1996); Miss. Code Ann. § 97-3-117 (1994); Va. Code Ann. § 18.2-58.1 (Michie 1996). The common elements of each of these statutes are the taking of a motor vehicle by threat of force or violence. *See, e.g.*, S.C. Code Ann. § 16-3-1075(B) (Law Co-op. Supp. 1996) ("A person is guilty of the felony of carjacking who takes, or attempts to take, a motor vehicle from another person by force and violence or by intimidation while the person is operating the vehicle or while the person is in the vehicle."). Some states also have enacted specific armed carjacking statutes to address carjackings in which a dangerous weapon is used. *See, e.g.*, D.C. Code Ann. § 22-2903(b)(1) (1996).

Those states that do not have a specific carjacking statute, such as New York, prosecute carjackings under the state's robbery statute. *See, e.g.*, *Kansas v. Vincent*, 908 P.2d 619, 621 (Kan. 1995) (defendant charged with felony murder, conspiracy to commit robbery and aggravated robbery in relation to a carjacking resulting in death); *New York v. Lee*, 652 N.Y.S.2d 2, 3 (App. Div. 1st Dep't 1996) (defendant charged with first degree robbery in the gunpoint theft of a car). As with the specific carjacking statutes, these robbery statutes apply to thefts involving the use of threat or force. *See, e.g.*, N.Y. Penal Law § 160.10(3) (McKinney 1997) ("A person is guilty of robbery in the second degree when he forcibly steals property and when . . . [t]he property consists of a motor vehicle . . . ."). Thus, even where there is no specific

carjacking statute, carjackings can be prosecuted adequately under state law.

Ultimately, my colleagues seem to reject the legislative intent approach, saying that "[n]otwithstanding that such a result was unintended, the Court declines any invitation to redraft the statute –that is a task better left to the legislature." Maj. Opn. at 9. (But that in fact is what they have done here.) The majority opinion goes on to find a conditional intent implicit in the carjacking statute as amended, but there is absolutely no basis for such a construction. The intent required is spelled out explicitly in the statute. The other reason assigned for reading conditional intent into the statute—that "the inclusion of a conditional intent to harm within the definition of specific intent to harm is a well-established principle of criminal common law," Maj. Opn. at 12—is irrelevant here. There is no federal common law of crimes, *see United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812), state criminal law supplies no authority for interpreting a federal criminal statute, and the Model Penal Code, cited in the majority opinion, never has been adopted by Congress. In point of fact, I can find no federal criminal statute that provides conditional intent as an element of the crime defined. Nor is there a general provision in the Federal Criminal Code, as there is in some state criminal codes, that the requirement of intent is satisfied by proof of conditional intent. *See, e.g.*, Haw. Rev. Stat. § 702-209 (1993) ("When a particular intent is necessary to establish an element of an offense, it is immaterial that such intent was conditional unless the condition negatives the harm or evil sought to be prevented by the law prohibiting the offense.")

To avoid a clear judicial usurpation of congressional authority, I would reverse and remand for a retrial upon instructions conforming with the foregoing analysis.

MANDATE

EDNY-BKLYN
95-CR-78
GLEESON

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the sixteenth day of September, one thousand nine hundred and ninety-seven.

PRESENT: JOSEPH M. McLAUGHLIN,
ROGER J. MINER,
Circuit Judges,
FREDERICK J. SCULLIN,
District Judge.

Docket No. 96-1563

UNITED STATES OF AMERICA,
Appellee,

v.

TEDDY ARNOLD; CHARLES ROBINSON; DARREL JONES; DAVID VALENTINE; PAUL SCAGLIONE; and JEFFREY DRAKE,
Defendants,

francois holloway a/k/a ABOU ALI,
Defendant-Appellant.

Appeal from a judgment of the United States District Court for the Eastern District of New York,

This matter came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued.

Upon consideration thereof, IT IS ORDERED that the judgment be, and it hereby is, AFFIRMED.

FOR THE COURT:
GEORGE LANGE III, Clerk
by: Beth J. Meador
Beth J. Meador, Administrative Attorney

*The Hon. Frederick J. Scullin, Judge of the United States District Court for the Northern District of New York, sitting by designation.

2ND CASE of Level 1 printed in FULL format.

UNITED STATES OF AMERICA, - against - FRANCOIS HOLLOWAY, also known as "Abdu Ali," Defendant.

95-CR-0078 (JG)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

921 F. Supp. 155; 1996 U.S. Dist. LEXIS 4905

April 5, 1996, Dated

COUNSEL: [**1] APPEARANCES:

ZACHARY W. CARTER, United States Attorney, Brooklyn, New York, By: Dolan L. Garrett, Assistant U.S. Attorney.

DANA HANNA, ESQ., Brooklyn, New York, Attorney for Defendant.

JUDGES: JOHN GLEESON, United States District Judge

OPINIONBY: JOHN GLEESON

OPINION: [*155] MEMORANDUM AND ORDER

JOHN GLEESON, United States District Judge:

Defendant Francois Holloway, also known as "Abdu Ali," was indicted on February 2, 1995. He was charged with conspiring to operate a "chop shop," in violation of 18 U.S.C. @ 371, operating a chop shop, in violation of 18 U.S.C. @ 2322, three counts of carjacking, in violation of 18 U.S.C. @ 2119, [*156] and three counts of using and carrying a firearm during and in relation to the charged carjackings, in violation of 18 U.S.C. @ 924(c). A jury trial was held in December 1995, after which Ali was found guilty of all charges.

Ali now moves for a new trial pursuant to Fed. R. Civ. P. 33, claiming that such relief is required in the interest of justice. In the alternative, he seeks reconsideration of his unsuccessful motion pursuant to Fed. R. Cr. P. 29, which he made at trial. The issue raised by the motion was also the central issue at the trial: what must the government prove [**2] to satisfy the intent element of the carjacking statute, 18 U.S.C. @ 2119? n1

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n1 Although Ali's motion purports to address all of the charges against him, none of his arguments addresses Counts One or Two (conspiracy to operate a chop shop and operation of a chop shop, respectively). Even if the challenges raised on this motion had merit, there would be no reason to set aside the jury's verdicts on those counts.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - -

There is no question that the conduct at issue in this case is precisely what Congress and the general public would describe as carjacking, and that

Congress intended to prohibit it in @ 2119. However, carelessness in the legislative process has produced a criminal statute that says something fundamentally different than what Congress obviously meant to say. As a result, Ali advances a colorable claim that his conduct here -- using a gun to terrorize motorists into giving up their cars -- is no longer prohibited by the carjacking statute. Indeed, it is likely that a 1994 amendment to the statute, [**3] which was explicitly intended to broaden the available penalties, in fact placed a large number of "carjackers" beyond its reach.

Ali, however, is not among them. Though colorable, his argument fails for the reasons set forth below, and his motion is denied.

A. The Facts

Vernon Lennon's father, Teddy Arnold, operated a "chop shop" in Queens, New York. Lennon stole cars for his father to chop. His father would tell him what year and model cars he needed, and Lennon would locate such cars and steal them. He did not know how to disable alarms or "hot wire" cars, so Lennon's modus operandi was to take the cars from their owners at gunpoint. Lennon was a team player, always taking another robber with him to help locate the target car and steal it. Since Lennon liked to follow a targeted car, often to the driver's home, before committing the robbery, a teammate was a virtual necessity; if the robbery was successful, there were two cars that had to be driven away.

Lennon has known the defendant Ali (whom Lennon knows as Francois Holloway) since they were boys. In approximately September 1994, he recruited Ali, who would hang around the chop shop, to steal cars with him. Lennon [**4] told Ali that Lennon would use a gun to steal the cars, and showed him the gun, a .32 caliber revolver. Ali agreed to help for a fixed fee per car stolen.

On October 14, 1994, Lennon and Ali stole a 1992 Nissan Maxima. They followed the car to the home of its driver, 69 year-old Stanley Metzger, in Queens. As Metzger got out of his car, Lennon and Ali got out of theirs. Lennon approached Metzger, pointed the gun at him, and demanded the keys. Metzger was apparently not fast enough in complying, so Lennon threatened to shoot him. Metzger handed over the keys, and was then told to hand over his wallet. He did so, and the robbers drove off with his car and his money.

On the next day, October 15, 1994, at approximately 8:00 p.m., Lennon and Ali spotted Donna DiFranco driving a 1991 Toyota Celica at the Whitestone Shopping Center in Queens. They followed her to her friend's house, and Lennon approached her after she exited her parked car. He pointed a gun at her and demanded her money and her car keys. She complied, and after some fumbling with the car alarm and an anti-theft device, Lennon and Ali took her car.

At approximately 10:00 p.m. on the same day, Lennon and Ali stole another [**5] car, a 1988 Mercedes Benz. They followed the victim, Ruben Rodriguez, to his home in the Jamaica Estates section of Queens. Both robbers got out of their car and approached Rodriguez, who had just stepped out of the Mercedes Benz. Lennon asked Rodriguez if he knew [*157] the location of a particular address. The address was, as Rodriguez put it, "way off base," and he knew "something was up." Rodriguez got back into his car and closed the door. Lennon pulled the gun and told him to get out of the car or he would be shot. Rodriguez got out of his car, and Lennon demanded his money as well as the keys. Rodriguez hesitated; his money was in a clutch bag on the passenger's seat, and he felt

he might be killed if he leaned into the car to get it. Frustrated by the delay, the defendant Ali punched Rodriguez in the face. Rodriguez reeled backwards from the punch and used that momentum to begin running away from the robbers, who fled with his car and his money.

On all three occasions, n2 Lennon and Ali intended to leave the victims unharmed. Lennon never fired the gun in any of the carjackings. An experienced criminal, he knew that if he did, he risked a lengthier prison term than he would receive [**6] for simply robbing the car. For each robbery, the plan was to use the firearm only to obtain possession of the car, not to shoot or otherwise harm the victim.

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n2 There was also evidence of two uncharged crimes committed by Ali with Lennon: one other successful carjacking and an attempted one that was aborted by the arrival of a police officer on the scene.

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However, in all three of the charged carjackings, Lennon was prepared to shoot the victims if their resistance made that necessary. In other words, he intended to kill or seriously injure the victims, but that intent was conditioned on their giving the robbers "a hard time." There was ample evidence from which a rational juror could infer that the defendant Ali shared that conditional intent.

B. The Carjacking Statute And Its 1994 Amendment

In September 1992, Paula Basu, a Maryland woman, had her car stolen from her by two men. The men forced her from her car and drove off. Because her infant daughter was in the car, Basu clung to it as the men [**7] drove away, and was dragged to her death.

This horrific offense generated a public outcry, and focused attention on legislative efforts to make car robberies a federal crime. Those efforts resulted in the Anti Car Theft Act of 1992, codified at 18 U.S.C. @ 2119. As initially enacted, this new federal offense read as follows:

Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall -

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

The subsections of the statute obviously related solely to punishment, and were not elements of the offense. They provided for enhanced penalties of up to 25 years if serious bodily injury resulted from the offense, [**8] and up to

life in prison if it resulted in death.

During 1993, Congress was considering extensive new criminal legislation, which included an array of new death penalties. Members of both houses proposed amendments to the newly-minted carjacking statute. The Senate bill proposed an amendment that would provide for the death penalty in cases where a carjacking results in death. S. 942, 103d Cong., 1st Sess. (1993). Senator Lieberman proposed a further amendment to this death penalty provision that would eliminate the requirement that such cases involve the use a firearm by the carjacker. In his remarks in support of his proposed amendment, Senator Lieberman observed:

If a carjacking occurs and a death occurs as a result of that, does it really matter whether a firearm was used, whether a knife was used, whether physical force was used, or whether a mother, as in the Basu case, was dragged to her death because [*158] she wanted to make every effort to save the life of her child?

...

In this case, the very bill I am amending has the death penalty for carjacking. All I am doing here is taking a small but I think significant additional step in saying, if the death penalty is going to [**9] be enacted into law for cases of carjacking where death occurs, then we ought not to require that that death has to involve a firearm. If the person in a carjacking is killed as a result of a knife or other weapon or just as a result of the carjacking, then the criminal ought to be subject to death himself. That is why I propose the amendment.

139 Cong. Rec. S15295, S15301, S15303 (1993) (statement of Sen. Lieberman).

Thus, with respect to carjackings resulting in death, the Senate bill eliminated the firearm requirement and provided for the death penalty. Because such a statute could authorize the death penalty for an accomplice who neither killed a victim nor intended to kill or harm the victim, it would have been subject to attack under the Eighth Amendment. See Enmund v. Florida, 458 U.S. 782, 73 L. Ed. 2d 1140, 102 S. Ct. 3368 (1982). Perhaps for that reason, the conference report for the bill modified the Senate death penalty amendment for carjacking by adding an intent requirement -- the "intent to cause death or serious bodily harm." H.R. Rep. No. 103-694, 103d Cong., 2d Sess. (1994).

These combined efforts resulted in the following provision of the Violent Crime Control and Law Enforcement Act [**10] of 1994:

(14) CARJACKING - Section 2119(3) of title 18, United States Code, is amended b striking the period after "both" and inserting ", or sentenced to death."; and by striking ", possessing a firearm as defined in section 921 of this title," and inserting ", with the intent to cause death or serious bodily harm."

Violent Crime Control and Law Enforcement Act of 1994 (the "Act"), Pub L. No. 103-322, Title VI, @ 60003(a) (14), 108 Stat. 1796, 1970 (1994). The provision was intended to affect only carjackings resulting in death. That was the sole focus of the legislative debates. Moreover, the provision was included in Title VI of the Act, which was entitled the "Federal Death Penalty Act of 1994." The most powerful evidence of the limited purpose of the amendment is Congress'

obvious belief that it was amending only a penalty enhancement provision, not the statutory prohibition itself. Specifically, it purported to amend "@ 2119(3)," the subsection of the original (and existing) statute that is solely a penalty provision. Indeed, it is the penalty provision applicable to cases in which death results, which cases were, as noted, the only focus of the legislature's [**11] attention.

However, the possession-of-a-firearm requirement that the amendment eliminated was not, as the amendment mistakenly assumed, located in 2119(3). In fact, it was not in any of the three penalty provisions; rather, it was an element of the offense itself, a necessary ingredient of all carjacking prosecutions, not just those resulting in death. Thus, in its effort to eliminate the firearm requirement only in cases resulting in death, Congress enacted an amendment that, on its face, eliminates it in all cases. n3

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n3 It has been suggested that, notwithstanding the unequivocal language of the amended statute, the firearm requirement has only been eliminated when the carjacking results in death, and still must be proved in cases, like this one, that fall within @ 2119 (a) or (b). M. Michenfelder, The Federal Carjacking Statute: To Be Or Not To Be? An Analysis Of The Propriety Of 18 U.S.C. @ 2119, 39 St. Louis U.L.J. 1009 (1995). Perhaps because a firearm was used in this case, however, that strained argument has not been made here, and thus its merits need not be addressed.

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[**12]

Similarly, Congress intended to add a new intent element for cases in which the death penalty is sought. However, notwithstanding the amendment's stated intention to affect only the penalty provisions of @ 2119(3), it added the new element -- "the intent to cause death or serious bodily harm" -- to the first clause of @ 2119, and thus made it applicable to all violations of the statute.

As amended, the statute now reads as follows:

Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received [*159] in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall -

(1) be fined under this title or imprisoned not more than 15 years, or both,

(2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

(3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

In short, the 1994 amendment to the carjacking statute effected fundamental changes that [**13] Congress never intended. The elimination of the firearm requirement for all cases federalized approximately 14,000 additional cases each year. n4 At the same time that it inadvertently opened the door for all these cases, Congress inadvertently closed it substantially by unintentionally

imposing the specific intent requirement on the entire statute, not just in death penalty cases. n5

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n4 See Michenfelder, supra note 3, at 1012-13 (35,000 carjackings or attempted carjackings were committed during each of the years 1987-92, and firearms were used 50% of the time).

n5 The government does not contend, as it might have, that the specific intent required by the 1994 amendment is an element only in carjacking cases where death results and the death penalty is sought. For that reason and because I conclude Ali had the specific intent required by the statute in any event, I do not need to address that issue.

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C. Discussion

Ali urges a literal construction of the amended statute, contending that it [**14] prohibits only those carjackings in which the perpetrators unconditionally intend to kill or seriously injure their victims. Under this reading, the law would not prohibit the crimes committed by Ali and Lennon, where the intent of the carjackers was not to kill or injure people, but to get cars. Indeed, this reading would no doubt insulate from federal prosecution the large majority of carjackings, as carjackers generally do not intend to cause death or serious bodily injury, but in fact hope that the opposite will occur, i.e., that the victim will peaceably give up the car and suffer no harm at all.

Thus, if accepted, Ali's construction of the carjacking statute would drastically narrow its scope. Only those carjackers who intend not only to rob cars, but also to murder or seriously injure another, could be prosecuted. A person who intends to find a Mercedes Benz, shoot the owner and take the car could be prosecuted. A person who intends to find a Mercedes Benz and shoot the owner only if she refuses to give up her car could not, at least if the plan succeeds and the car is taken without the need to fire.

This would be an odd result. The statute would no longer prohibit the [**15] very crime it was enacted to address except in those unusual circumstances when carjackers also intended to commit another crime -- murder or a serious assault. Moreover, this result, if accepted, would be the ironic product of legislation that was intended "to broaden and strengthen [the carjacking statute] so our U.S. attorneys (sic) have every possible tool available to them to attack the problem." 139 Cong. Rec. S15295, S15301 (1993) (statement of Sen. Lieberman).

Ali's argument fails because his intent to aid and abet Lennon's use of the firearm if the victims resisted is sufficient. Where a crime is defined to require a particular intention, that element is satisfied even if the requisite intent is conditional, unless the condition negatives the evil sought to be prevented by the statute. W. R. Lafave and A. W. Scott, Jr., Handbook on Criminal Law, @ 28 at 200 (1972).

Although the issue of conditional intent is not raised very often, at least in the federal courts, it is not new. In People v. Connors, 253 Ill. 266, 97

N.E. 643 (Ill. 1912), the defendants held guns to members of a rival labor union and told them to take off their overalls or they would be shot. Although [**16] the workers complied, and there was no shooting, the defendants were convicted of assault with an intent to murder. 253 Ill. at 273. In upholding the conviction, the Supreme Court of Illinois held that the crime is "complete where it is shown that the assailant, with the [*160] present ability to destroy life or do great bodily harm, draws a dangerous weapon on another and threatens to kill him unless the party assailed complies immediately with some unlawful condition or demand. . . . The offense is complete even though commission of the felony is averted by the submission of the assailed party to the unlawful demands made upon him." Id. at 647-48.

Some conditions on intent may bring the conduct out of the reach of the statute. In Hairston v. Mississippi, 54 Miss. 689 (1877), Hairston attempted to remove the personal effects of a laborer from a plantation. When the plantation owner grabbed Hairston's mules to prevent him from removing the property, Hairston pointed a pistol at him and angrily threatened to "'shoot any G-d d--d man who attempts to stop my mules.'" Id. at 692. The plantation owner released the mules, and Hairston was convicted of assaulting him with intent to [**17] murder. The Supreme Court of Mississippi reversed the conviction. Because the plantation owner was trespassing on Hairston's property by grabbing his mules, the threat to shoot was conditioned on a demand Hairston had a right to make, and thus he could not be guilty of the offense.

Here, of course, there can be no doubt that the intent to shoot the victims was conditioned on a demand -- that they turn over their cars -- that Lennon and Ali had no right to make.

Not all instances of conditional intent involve demands by the defendant. A person may break into a house intending to rape its occupant if she is home, or to steal from it only if no one is home. Section 2.02(6) of the Model Penal Code provides as follows:

Requirement of Purpose Satisfied if Purpose Is Conditional. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense.

See also United States v. Arrellano, 812 F.2d 1209, 1212 n.2 (9th Cir. 1987).

Viewed under this standard, the conditional nature of Ali's intent obviously does not help [**18] him. The evil sought to be prevented by @ 2119 in not "negatived" by the condition, it is the condition. Section 2119 is not a murder or assault statute, it is a car robbery statute.

Ali's argument on this motion relies in part on the premise that there was insufficient evidence from which a juror could find an intent on his part that recalcitrant victims be shot. However, as stated above, there was ample evidence from which a jury could infer that intent. Lennon told Ali that a gun would be used and showed him the gun. Lennon intended to shoot uncooperative victims, and threatened to do so in Ali's presence. Ali himself demonstrated a seriousness of purpose by punching one of the victims in the face simply because he hesitated in handing over his money. Ali makes much of the fact that there is no direct evidence of his intent, but there rarely is such evidence. The jury could readily have inferred it from the circumstances, and Ali thus cannot satisfy

his heavy burden of establishing the insufficiency of the evidence.

Finally, Ali's reliance on the rule of lenity is misplaced. Whether conditional intent is sufficient to establish the intent element of the carjacking offense [**19] is not a question of statutory construction, but o criminal law.

The jury instructions on the element of intent in the carjacking counts included the following:

In some cases, intent is conditional. That is, a defendant may intend to engage in certain conduct only if a certain event occurs. In this case, the government contends that the defendant intended to cause death or seriously bodily harm if the alleged victims had refused to turn over their cars. If you find beyond a reasonable doubt that the defendant had such an intent, the government has satisfied this element of the offense.

If you find that the co-defendant, Vernon Lennon, acted with the intent to cause death or serious bodily injury, that is not sufficient. You must find tha the defendant shared in that intent before you can conclude that this element has been satisfied. [*161] I remind you that you must consider each count separately.

In view of the foregoing, those instructions, and the charge as a whole, properly permitted the jury, if it accepted the government's evidence, to find Ali guilty of carjacking.

D. Conclusion

It is likely that many incidents of what both Congress and the general publi would [**20] call carjacking are no longer prohibited by @ 2119. Without doubt, some car robbers threaten death or serious bodily injury, but intend to flee the scene rather than escalate the confrontation if the demand for the car is rebuffed. A defendant with that state of mind may not be subject to prosecution under @ 2119, even if the threat succeeds and he robs the car.

However, because Ali had the specific intent required by the statute, albeit conditionally, his motion to set aside the verdicts and for a new trial is denied.

So Ordered.

JOHN GLEESON, U.S.D.J.

Dated: Brooklyn, New York

April 5, 1996

person and presence of another, by force and violence and by intimidation.

All three of these offenses, Count 7, Count 9, Count 11, call for the government to prove each of the following elements beyond a reasonable doubt.

First, that the defendant knowingly and willfully took or attempted to take a motor vehicle.

Second, that the defendant at the time of the taking, intended to cause death or serious bodily harm.

Third, that the taking of the motor vehicle was accomplished by force and violence or by intimidation.

Fourth, that the motor vehicle taken was transported, shipped or received in interstate commerce.

The first of these elements that the defendant knowingly took or knowingly attempted to take a motor vehicle. As I explained before to do something knowingly is to act purposely and voluntarily and not because of a mistake or accident or other innocent reason.

Now, the defendant need not have been aware of the specific law and rule that his conduct may have violated, but he must act with a specific intent to do whatever it is the law forbids, here take a motor vehicle by force, violence or intimidation.

The second element the government must prove beyond a reasonable doubt is that the taking was committed with the intent

to cause death or serious bodily harm. This requires you to make a determination about the defendant's state of mind at the time of the conduct in question. I've already discussed with you the fact that a person's intent can rarely be proved by direct evidence. You should consider the totality of the circumstances presented by the evidence before you.

The defendant's intent in committing the crime must have been to cause death or serious bodily harm. I remind you that intentional conduct is done willfully, with a bad purpose to do something the law forbids, in this case, to cause death or serious bodily harm to the person from whom the car was taken.

It is the defendant's theory of the case that the evidence fails to prove that he acted with intent to cause death or serious bodily harm.

If the government has failed to prove beyond a reasonable doubt that the defendant acted with the intent to kill or cause serious bodily harm to the particular victim, you must find him not guilty of that offense.

The defendant is entitled to the presumption of innocence with regard to all of the elements of the offense including this element. That is, you must presume that the defendant did not possess the intent to kill or cause serious bodily harm and you must continue to give the benefit of that presumption to the defendant unless and until it is proven beyond a reasonable doubt that the defendant intended to cause death or

serious bodily harm at the time of the events you are considering.

Evidence that the defendant intended to use a gun to frighten the victims is not sufficient in and of itself to prove an intent to kill or cause serious bodily harm. It is, however, one of the facts you may consider in determining whether the government has met its burden.

You may also consider the fact that no victim was actually killed or seriously injured when you consider the evidence or lack of evidence as to the defendant's intent.

In some cases, intent is conditional. That is, a defendant may intend to engage in certain conduct only if a certain event occurs.

In this case, the government contends that the defendant intended to cause death or serious body harm if the alleged victims had refused to turn over their cars. If you find beyond a reasonable doubt that the defendant had such an intent, the government has satisfied this element of the offense.

If you find that the co-defendant, Vernon Lennon, acted with the intent to cause death or serious bodily injury, that is not sufficient. You must find that the defendant shared in that intent before you can conclude that this element has been satisfied.

Let me also remind you, you must consider each count separately.

Serious bodily harm is defined to be "bodily injury" which involves substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of a bodily member, organ, or mental faculty.

This is to be distinguished from "bodily harm" which means cut, abrasion, bruise, burn, or disfigurement, physical pain or any other injury to the body, no matter how temporary.

Proof of intent to cause bodily harm as opposed to serious bodily harm is insufficient.

The third element the government must prove is that the taking of the motor vehicles were accomplished by force or violence or by intimidation.

The government can meet its burden on this element by proving beyond a reasonable doubt either that the defendant used force or violence or that the defendant acted in an intimidating manner, it need not prove both. The phrase "intimidating manner" means that the defendant said or did something that would make an ordinary person fear bodily harm or for the purpose of causing another person to fear bodily harm.

However, it is not necessary for the government to prove that the victim was actually frightened in order to establish that the defendant acted in an intimidating manner. Your focus should be on the defendant's behavior. Although the government does not have to show that the defendant's behavior caused or could have caused terror, the government does have to show that

written form, part of the charge.

I understood you to object to sending them the whole charge. That's why I am proceeding the way I intend to do now. I am afraid by sending, in written form, just part of it, I will undercut the bedrock principle that they should view all my instructions as a whole.

MR. HANNA: We would respectfully object to this, request that you send in the charge.

THE COURT: All right. Your request is denied.

Bring in the jury.

THE CLERK: All rise.

(11:30 - jury entered the courtroom).

THE COURT: Please be seated, everyone. Good morning, ladies and gentlemen. Everybody made it in okay eventually.

All right. At the end of the day yesterday, I received from you what's been marked as Jury Note 1: "Need a copy of the law as stated by the Judge on intent."

What I will do now is read to you the portions of the charge I gave you yesterday that relate to intent. There are two segments of the charge that respond to your note.

Let me remind you at the outset that although I intend to do that, let me remind you not to single out any one instruction, these ones included relating to intent, as alone stating the law. Rather, you should consider my instructions

a whole when you deliberate.

Now I instructed you regarding intent in two respects. First, regarding knowledge, and intent generally as opposed to in the context of the particular counts. Let me reread to you my instructions regarding knowledge and intent generally.

As a general rule, the law holds persons accountable only for conduct they intentionally engage in. Thus, in describing the various crimes that have been charged to you, I have on occasion explained, before you can find the defendant guilty you must be satisfied that he was acting knowingly and intentionally.

Let me explain what those terms mean under the law.

A person acts knowingly if he acts purposely and voluntarily and not because of a mistake or accident or some other innocent reason. A person acts intentionally if he acts willfully with the specific intent to do something the law forbids.

Now the person need not be aware of the specific law or rule that his conduct may be violating, but he must act with a specific intent do whatever it is the law forbids.

These issues of knowledge and intent require you to make a determination about a defendant's state of mind, something that can rarely be proved directly. A wise and careful consideration of all the circumstances, including the

defendant's actions and omissions, may permit you to make a determination as to a defendant's state of mind. Indeed, in your everyday affairs, you are frequently called upon to determine a person's state of mind from his words and actions and unique circumstances. You are asked to do the same thing here.

Now, I also charged you regarding intent in connection with the specific crimes charged in 7, 9, and 11. Those are the offenses charging the taking of a motor vehicle by force, violence, or intimidation.

Just to give you a little bit context, I instructed that there were four elements that must be proved by the government beyond a reasonable doubt before you may find the defendant guilty of any of those crimes.

Those elements are as follows.

First, that the defendant knowingly and willfully took or attempted to take a motor vehicle.

Second, that the defendant, at the time of the taking, intended to cause death or serious bodily harm.

Third, that the taking of the motor vehicle was accomplished by force and violence or by intimidation.

And lastly, that the motor vehicle taken was transported, shipped, or received in interstate commerce.

Now, it strikes us responsive to your note regarding intent are the instructions regarding the second element,

element of intent. I will reread those to you now.

The second element the government must prove beyond a reasonable doubt is that the taking of a motor vehicle was committed with the intent to cause death or serious bodily harm. This requires you to make a determination about the defendant's state of mind at the time of the conduct in question.

I've already discussed with you the fact that a person's intent can rarely be proved by direct evidence. You should consider the totality of the circumstances presented by the evidence before you. The defendant's intent in committing the crime must have been to cause death or serious bodily harm. I remind you that intentional conduct is done wilfully with the purpose to do something the law forbids. In this case, to cause death or serious bodily harm to the person from whom the car was taken.

It is the defendant's theory in the case that the evidence fails to prove that he acted with indent to cause death or serious bodily harm. If the government has failed to prove beyond a reasonable doubt that the defendant acted with the intent to kill or cause serious bodily harm to the particular victim, you must find him not guilty of that offense.

The defendant is entitled to the presumption of innocence with regard to all elements of the offense,

including this element of intent. That is, you must presume that the defendant did not possess the intent to kill or cause serious bodily harm and you must continue to give the benefit of that presumption to the defendant unless and until it is proven beyond a reasonable doubt that the defendant intended to cause death or serious bodily harm at the time of the offense you are considering.

Evidence that the defendant intended to use a gun to frighten the victims is not sufficient in and of itself to prove an intent to kill or cause serious bodily harm. It is, however, one of the facts you may consider in determining whether the government has met its burden. You may also consider the fact that no victim was actually killed or seriously injured when you consider the evidence or the lack of evidence on the defendant's intent.

In some cases, intent is conditional. That is, a defendant may intend to engage in certain conduct only if a certain event occurs.

In this case, the government contends that the defendant intended to cause death or serious bodily harm if the alleged victims had refused to turn over their cars. If you find beyond a reasonable doubt that the defendant had such an intent, the government has satisfied this element of the offense. If you find that the co-defendant, Vernon Lennon, acted with the intent to cause death or serious body injury

that is not sufficient. You must find that the defendant shared in that intent before you can conclude that this element has been satisfied.

I remind you must consider each count separately.

Serious bodily harm is defined to be bodily injury which involves substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of a bodily member, organ, or mental faculty. This is to be distinguished from mere bodily harm, which means, cut, abrasion, bruise, burn, disfigurement or physical pain or any other injury to the body no matter how temporary. Proof of intent to cause bodily harm is insufficient.

Those are my instructions to you regarding intent. Hopefully, that answers your question.

Let me ask you to return to the jury room and resume your deliberations.

THE CLERK: All rise.

(10:45 a.m. - Jury deliberations resume.)

THE COURT: Please be seated.

(Court in recess awaiting the verdict of the jury.)